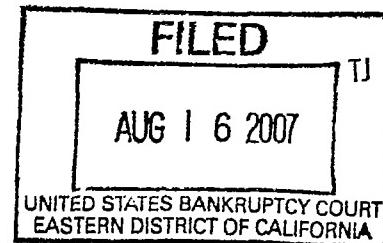


(14)



UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re:)
HOA KY HANG,) Case No. 05-30655
Debtor.)

KENNETH SANDERS, Chapter 7)
Trustee,)
Plaintiff,)
v.)
QUAN KY HANG,)
Defendants.)

06-02274-C

Adversary No. 06-02274-C

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Pursuant to Fed. R. Bankr. Proc. 7052 and Fed. R. Civ. Proc. 52, the court makes the following findings of fact and conclusions of law.

Trial was conducted in this matter on June 4, 2007. Thomas R. Phinney, Parkinson Phinney, appeared on behalf of chapter 7 trustee Kenneth Sanders ("Trustee" or "Plaintiff"). Tuan Van Lai appeared on behalf of defendant Quan Ky Hang ("Defendant" or "Quan Hang")

36

1 or "Son").

2 Plaintiffs Local Rule 9017 Exhibits, pages 1 to 458, were admitted into evidence,
 3 referred to herein as "TX" for Trustee's Exhibits, with reference to the page number(s) and
 4 line number(s) if applicable.¹ Defendant's Local Rule 9017 Exhibits, pages 1 to 198, together
 5 with a statement relating to Defendant's liquidation of stock ("Tab 0"), were admitted into
 6 evidence, referred to herein as "QX," for Quan Hang's Exhibits, with reference to the page
 7 number(s) and line number(s) if applicable.

8 Any conclusions of law herein that are more properly characterized as findings of fact,
 9 shall be treated as findings of fact

10 I. FINDINGS OF FACT

11 1. In 1990, the Debtor bought a house commonly known as 7809 39th Avenue,
 Sacramento, 95824 ("the House"). TX, p. 8 (1st ¶).

12 2. In 1992, the Debtor brought his son Quan Hang, from Vietnam to live with
 Him at the House. The Son was approximately 18 years old at the time. QX, p. 1 (¶¶ 4, 6, 7).

13 3. From 1992 through 2000, the Son lived in the House without paying rent or
 other property-related expenses. [Request for Admission ("RFA") 20, 21, TX227, 240].

14 4. The Debtor was a partner in establishing a Vietnamese language magazine
 called Lang Magazine, where he worked for many years. The Debtor got his Son a job there
 in 1998, and the Debtor and his Son worked at Lang Magazine together until 2003 when the
 Debtor stopped working there. The Son continues to work at Lang Magazine. Since 2001,
 the Son has worked full time at Lang Magazine earning \$2,000 per month. TX p. 386 (Depo
 Tr. p.23); TX p. 232 and 242 (Interrogatories 55 to 61);

27 ¹ Plaintiff's 9017 Exhibits, Tabs 1, 2, and 24, 25, are court documents and were included for reference.

1 5. In or about January, 2001, the Son began paying the monthly mortgage on the
2 House in the approximate amount of \$600 per month. TX 80, 86 (Interrogatory 9, 10); TX
3 189 (1st mortgage payment, check no. 740 on February 14, 2001 in the amount of \$601.02.).

4 6. On February 12, 2002, the Father filed a chapter 13 petition, Case No. 02-
5 21550. TX p.41-60. The Debtor claimed the House as his exempt homestead, which was
6 essentially his only asset as shown on his schedules. Also as shown in the schedules, the
7 Debtor had over \$80,000 in debt.² The case was voluntarily dismissed on April 25, 2002. TX
8 p.72.

9 7. In 2002, the Debtor obtained a \$90,000 loan from Duc Nguyen (TX p.23) and
10 a \$49,000 loan from Michelle Stoskoff (TX p.25). In 2003, the Debtor obtained an \$80,000
11 loan from Xong Lu (TX p.23). In 2003, Wells Fargo obtained a judgment against the Debtor
12 in the amount of \$25,000 (TX p.25).

13 8. On December 3, 2002, while insolvent, Father executed a grant deed of the
14 House to the Son. The transfer is identified on the deed as a "gift." (TX p. 290). This
15 transfer is hereafter identified as the "Transfer."

16 9. At the time of the Transfer: (1) the Debtor was insolvent; (2) the Debtor was
17 engaged in a business or a transaction for which the remaining assets of the debtor were
18 unreasonably small in relation to the business or transaction; and (3) the Debtor had incurred
19 debts, and continued to incur debts, that were beyond his ability to pay as they became due.

20 10. As set forth in the Debtor's written statement to the Trustee, his Son did not pay
21 the Debtor anything for the House, and the Debtor did not receive any consideration. TX p.8
22 (1st ¶).

23 11. In January 2004 (thirteen months after the Transfer), the Son refinanced the

24
25
26 ² Note that the totals shown at the bottom of some of the pages of the Debtor's Schedule F are
27 understated.

1 house. See TX p.248 (closing statement). From the refinance proceeds, the Son paid off
 2 \$25,474.23 in credit card debts owing by the Son. (TX p.248). Although all of the credit
 3 cards were owed by the Son, at trial the Son explained that one of the credit card debts
 4 (\$4,714 owing to Chase Mastercard) was a credit card under the name of Son and the Father
 5 jointly. From the refinance, there was also **\$16,374.36** in cash proceeds, which the Son
 6 deposited into his account. (TX p.248, p.441, p.440; QX 136).

7 12. The Son claims he gave the \$16,374.36 in cash to the Father, but bank records
 8 establish that the funds, less \$2,000 in cash, were deposited into the Son's account. TX p.
 9 441, 440 (escrow check), QX p. 136 (bank statement). In his deposition (prior to the Trustee
 10 having obtained the specific bank deposit records), the Son was questioned about a \$14,373
 11 deposit in January 2004 that appeared to be the refinance proceeds. The Son testified that the
 12 funds were not from the refinance but were supposedly from "cash" accumulated from his
 13 wife's 2003 earnings and from the Son's modest earnings of \$2,000 per month. The Son
 14 testified he set aside cash until \$14,374 was accumulated and then deposited in the bank
 15 account. See TX p.387-88 (Depo 29:18- 25; 32:2-11). The Son's tax returns report no
 16 income for the wife in 2003. TX pp. 328-333.

17 13. In January 2005, the Son sold the House and received **\$116,253** in proceeds,
 18 which went into the Son's bank account. TX p89, QX p.168. **\$72,570** was used as the down
 19 payment to purchase a new house at 8431 Jordan Ranch Road, Elk Grove CA 95624 (the "2nd
 20 House"). TX p.123, QX p.172 (two deposits of \$71,745 and \$825).

21 14. On August 30, 2005, the Father filed a chapter 7 petition. He testified in his
 22 Statement of Financial Affairs that the Transfer of the House to the Son was a gift. TX p.33
 23 (SFA ¶ 7: Transfer of House was Gift.).

24 15. In 2004 and again in 2005, the Debtor asked the Son to put the Debtor on title

1 to the 2nd House. The Son did not respond to the Debtor's requests. TX p.390 (Depo Tr.
2 39:9-40:2).

3 **Son's Defense**

4 16. The Son contends that in January 2001, the Father orally agreed to transfer title
5 to the House to the Son if the Son would pay property related expenses going forward and for
6 "reasonable cash payments." The Son admits, however, never discussed with the Father what
7 the amount or timing of the "reasonable cash payments" would be. The evidence regarding
8 the "agreement" includes the following:
9

10 Rog. 69: Please identify **each communication** between YOU and the DEBTOR
concerning the sale of the [House]. [TX p.234]

11 Response: 1/2001: Debtor agreed to sell [the House] to Defendant. [TX p.243]

12 Rog. 67: If there was an agreement between YOU and the DEBTOR concerning the
transfer of the [House] to YOU, please state each and every term of the agreement.

13 Response: Debtor to transfer title to Defendant if Defendant pay for all property-
related expenses plus **reasonable cash payments** to him. TX p.243.
14

15 Depo Question: Did you ever talk about how much you were going to pay your dad
for the house?

16 Answer: No. TX p.383, p 11:13-15.
17

18 17. In June 2004, the Son reports that he received \$20,000 in cash as a "cash-out"
19 of his interest in "Copy & Print," a business. The Son says he gave the cash to his Father.
20 Because the Debtor has no records to support his claim that he gave this cash to his Father,
21 and because the Debtor's written statement provides that the Son did not pay him anything or
22 provide consideration for the House, and because the Son's testimony was not credible at least
23 with respect to the disposition of the \$16,374.36 in refinance proceeds in January 2004, the
24 court is not convinced that the Son actually gave the Debtor \$20,000 in cash. Further, the
25 court is convinced that to the extent the Son gave the Debtor cash from the "cash-out" of the
26 court is convinced that to the extent the Son gave the Debtor cash from the "cash-out" of the
27

1 Son's interest in Copy & Print, such payment of cash was not given in consideration for the
2 Transfer of the House.

3 18. During January 2004 through June 2005, the Son says he gave the Father
4 \$10,744 in **cash**, in increments varying from \$300 to \$2,314. See response to Rog 23, TX
5 p.240 (listing dates and amounts of alleged payments). His only documentation is bank
6 statements showing cash withdrawals from his account. Each and every time there is "cash
7 withdrawal" on his bank statement during 2004 and 2005, the Son claims that he gave all such
8 cash to his Father. TX 389, p.34. The court does not believe that the Son gave the Debtor all
9 of the cash shown on these cash withdrawals totaling \$10,744. Further, the court is convinced
10 that to the extent the Son gave the Debtor cash from these transactions, such payments of cash
11 were not given in consideration for the Transfer of the House.

12 19. Checks obtained by the Trustee from Bank of America on May 10, 2007, show
13 that in early 2004 (right after the refinance loan) the Son wrote two checks to the Debtor, one
14 for \$5,000 and one for \$2,000. TX 443, 445. At trial, the Son claimed that these payments
15 and also another \$2,000 check also recently obtained by the Trustee (TX p. 444) were also
16 part of his "reasonable cash payments" for the House. The court finds that none of these
17 transfers are part of any consideration for the Transfer of the House.

18 20. The only income that the Son had during 2001 through 2005 was \$2,000 per
19 month salary from Lang Magazine. The Son's wife earned no income in 2002 or 2003, and
20 earned \$5,019 in 2004 and \$2,800 in 2005. See TX Tab 21 (tax returns 2000 to 2005);
21 Responses to Interrogatories 56 and 57, TX p.233, TX, p.242. The Son only had one bank
22 account. See Response to Interrogatory 65 (TX, p.234, TX, p.242; QX 71-187 (Son's Bank
23 Statements Jan. 01 to Dec. 05). The Son had very little financial ability to pay his Father
24 anything, except as to monies generated from the refinance and sale of the House. With
25
26
27

1 possible minor exceptions, all of these funds were retained by the Son and also were used to
2 buy the 2nd House.

3 21. The Defendant did not provide any substantial evidence in support of any
4 improvement to the House or the 2nd House.

5 22. As to the findings of fact stated above, to the extent they are based upon
6 references to Defendant's deposition testimony and discovery responses, the Defendant also
7 testified consistently with these responses at trial.
8
9
10
11
12
13
14

II. SUMMARY OF PROCEEDS RECEIVED BY QUAN HANG

16 **Refinance of House: TX, p.248 (1/04)**

17 **\$25,471 credit cards paid**

18 **\$16,374 cash**

19 subtotal **\$41,845**

20 **Sale of House: TX, p.89 (1/05)**

21 **\$116,253**

22 **\$72,570 used for 2nd House**

23 **\$43,683 net cash to Defendant**

III. THE TRANSFER OF THE HOUSE IS AVOIDABLE

24 Turning to conclusions of law, Section 544(b) of the Bankruptcy Code permits the
25 Trustee to stand in the shoes of a creditor to assert any state law claims that a creditor may
26

have. *Kupetz v. Wolf*, 845 F.2d 842, 845 (9th Cir.1988). Specifically, § 544 of the Code provides that “the trustee may avoid any transfer of an interest of the debtor in property...that is voidable under applicable law by a creditor holding an [allowable] unsecured claim...” 11 U.S.C. § 544(b). Under California law, an unsecured creditor may avoid a fraudulent transfer. Cal. Civ.Code §§ 3439.04, 3439.07. A transfer is fraudulent if the debtor made the transfer or incurred the obligation as follows:

- (1) With actual intent to hinder, delay, or defraud any creditor of the debtor.
- (2) **Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either**
 - (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
 - (B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Cal. Civ.Code § 3439.04(a).

The Trustee has satisfied all of the elements of avoiding the Transfer.

Solvency. The Debtor was insolvent at the time he made the Transfer in December, 2002 under any measure, including under Civ. Code § 3439.04(2)(A) and (2)(B), and 3439.05.

There was No Reasonably Equivalent Transfer. The Son’s defense in this case is that he gave “reasonably equivalent consideration” and that it was “in exchange” for the Transfer. The Son failed to establish reasonably equivalent value in this case for four independent reasons:

- (1) The Debtor admits that he did not receive **any** consideration, and the court believed this statement.
- (2) The disputed “consideration” alleged by the Son was given years after the fact and

1 was not given "in exchange" for the Transfer;

2 (3) The equivalency of the consideration is evaluated at the time of the Transfer. See
 3 e.g., *In re Morris Communications NC Inc.*, 914 F.2d 458 (4th Cir. 1990). At the time of the
 4 Transfer all the Son says that the Debtor got was his **unenforceable** oral promise to make
 5 "cash payments" in an unspecified amount and at an unspecified time, and thus the
 6 consideration was not reasonably equivalent. The Son's promise was legally unenforceable
 7 for two independent reasons: (1) the alleged "agreement" violated the Statute of Frauds (Civ.
 8 Code § 1623(a)(3)), which requires that agreements relating to the sale of the real property
 9 be in writing to be enforceable, and (2) the alleged sale agreement even as portrayed by the
 10 Son was totally illusory because it did not include a price term or other basic terms. Instead,
 11 the Son allegedly promised to make, at his discretion, such payments in such amounts and at
 12 such times as he deemed "reasonable." Thus, even if the Son's testimony about the agreement
 13 was believed (and the court did not believe it), there is no reasonably equivalent consideration.

14 (4) Even if, as the Son alleges, any alleged undocumented and disputed cash transfers
 15 claimed to have been made by the Son to the Debtor were accumulated and counted by the
 16 court as retroactive consideration for the Transfer, the "consideration" amounts to less than
 17 \$20,000 (three checks totaling \$9,000 written after the refinance escrow, and possibly small
 18 additional cash payments),³ and thus is not reasonably equivalent to the \$80,000 put forward
 19 by the Son as the the amount he thought he should pay the Debtor. See e.g., TX 383, Depo
 20 Tr. 11:9-12.

21 Intent to Defraud. In this case, the Debtor does not dispute that the Transfer was an
 22 outright gift. The Transfer was made at a time when the Debtor was significantly insolvent,
 23 and at a time when the Debtor was accumulating significant additional debt. Under the
 24

25
 26 ³ The court does not include the alleged \$20,000 Copy & Print payment, but again, even if it and
 27 everything else is included, it is a total of \$40,000 well after a Transfer the Son contends had a value of
 \$80,000.

1 circumstances, I am convinced that the Transfer was made with actual intent to hinder delay
 2 or defraud creditors.

3 Present and Future Creditors. The credit card debt shown on the Debtor's 2002
 4 Schedules remained unpaid over the next three years and is carried forward onto the Debtor
 5 2005 Schedules. The Debtor also accrued substantial new debt in 2002 and 2003.

6 Avoidance. Because the Transfer was made by an insolvent, and the Debtor did not
 7 receive reasonably equivalent consideration in exchange for the Transfer, and because the
 8 Transfer was made with actual intent to defraud, the Transfer is avoidable.

10 **IV. THE TRUSTEE IS ENTITLED TO RECOVER THE PROPERTY
 AND/OR THE VALUE OF THE PROPERTY UNDER SECTION 550,
 INCLUDING THE APPRECIATION IN THE VALUE OF THE HOUSE**

12 Once a trustee demonstrates the right to avoid a transfer, the trustee is entitled to
 13 recover the transfer or the value of the transfer pursuant to § 550(a). *In re Acequia, Inc.*, 34
 14 F.3d 800, 809 (9th Cir.1994); *In re Brun*, 366 B.R. 669, 672 (Bankr. C.D.CA 2007). Section
 15 550 provides in relevant part that:

16 [T]o the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b),
 17 or 724(a) of this title, the trustee may recover, for the benefit of the estate, **the
 property transferred**, or, if the court so orders, **the value of such property**, from

19 (1) the initial transferee of such transfer or the entity for whose benefit such transfer
 20 was made.

21 11 U.S.C. § 550(a)(1). Section 550 separates the concepts of avoiding a transfer and
 22 recovering from the transferee. *In re Acequia, Inc.*, 34 F.3d 800, 809 (9th Cir.1994); *In re
 Brun*, 366 B.R. 669, 672 (Bankr. C.D.CA 2007) (citing H.R.Rep. No. 95-595, at 375 (1977).

25 The trustee is entitled to recover the "greater of the value of the transferred property
 26 at the transfer date or the value at the time of the recovery." Collier on Bankruptcy, 15th ed.,
 27

¶ 550.02 [3]; *Brun*, 366 B.R. 669, 674-75 (Bankr. C.D.CA 2007); *Langhorne v. Warmus (In re American Way Serv. Corp.)*, 229 B.R. 496, 530-31 (Bankr.S.D.Fla.1999) (“[W]hen the property has appreciated, the trustee is entitled to recover the property itself, or the value of the property at the time of judgment”); *Govaert v. B.R.E. Holding Co., Inc. (In re Blitstein)*, 105 B.R. 133, 137 (Bankr.S.D.Fla.1989) (“[T]he Trustee is entitled to at least a money judgment in the amount of the greater of the value at the time of the transfer; or the value at the time of recovery less the value of improvements made.”).

As noted by Collier, this result is consistent with the well-established purpose of § 550, to restore the estate to the position it would have occupied had the property not been transferred. Moreover, a trustee has the option (if available) to recover the property transferred, which means the estate would benefit from any appreciation. Section 550(e) demonstrates the intent of Congress that any appreciation not attributable to the actions of a good faith transferee inures to the benefit of the estate. Pursuant to § 550(e), a good faith transferee is entitled to a lien to secure the lesser of the cost of any improvements, or an increase in value as a result of such improvements. *See* 11 U.S.C. § 550(e); *see also* Collier on Bankruptcy, *supra*, ¶ 550.02[3].⁴

In this case, the result of the avoidance of the Transfer is that the Trustee is entitled to recover from Defendant the value and/or property that he received as a result of the January 2004 refinance, and the January 2005 sale. As set forth above, approximately half of these proceeds are directly traceable as the purchase price for the 2nd House.

The burden is on the Defendant to establish entitlement as a good faith transferee to a lien on the property recovered pursuant to 11 U.S.C. § 550(e). Given the contrast between

⁴ Collier also notes that this result serves the equitable underpinnings of restorative justice by discouraging a “wait and see” approach by transferee defendants holding property, such as stock, that may be subject to wide, rapid swings in value on account of volatile markets. Likewise, as noted in the legislative record, “a transferee has an opportunity to benefit by delay, and there are possibilities for abuse where the transferred property is appreciating substantially in value.” *Id.* at footnote 6.

1 the testimony of the Debtor and the Defendant, given the lack of any meaningful consideration
 2 given by the Son, and given the credibility problems with the Defendant's testimony, the court
 3 is not persuaded that the Defendant is a good faith transferee. Additionally, the Defendant
 4 did not put forth any testimony at trial or in his 9017 Declaration to support a finding that he
 5 made any improvement to the House or the 2nd House. Accordingly, the Defendant is not
 6 entitled to any lien on the recovery pursuant to 11 U.S.C. § 550.

7 **V. A CONSTRUCTIVE TRUST IS AN APPROPRIATE REMEDY**

8 A constructive trust is an involuntary equitable trust created as a remedy to compel the
 9 transfer of property from the person wrongfully holding it to the rightful owner. *Communist*
 10 *Party v. 522 Valencia, Inc.*, 35 Cal.App.4th 980, 990 (1995). California Civil Codes §§ 2223
 11 and 2224 set out the circumstances under which constructive trusts are generally imposed.
 12 Cal. Civil Code § 2223 states: “[o]ne who wrongfully detains a thing is an involuntary trustee
 13 thereof, for the benefit of the owner.” Cal. Civil Code § 2224 states: “[o]ne who gains a thing
 14 by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act,
 15 is, unless he or she has some other and better right thereto, an involuntary trustee of the thing
 16 gained, for the benefit of the person who would otherwise have had it.”

17 The imposition of a constructive trust requires” (1) the existence of res (property or
 18 some interest in property); (2) the right of the complaining party to that res; and (3) some
 19 wrongful acquisition or detention of the res by another party who is not entitled to it.
 20 *Communist Party*, 35 Cal.App.4th at 990. The wrongful act giving rise to a constructive trust
 21 need not amount to fraud or intentional misrepresentation. All that must be shown is that the
 22 acquisition of the property was wrongful and that the keeping of the property by defendant
 23 would constitute unjust enrichment. *Calistoga Club v. City of Calistoga*, 143 C.A.3d 111, 116
 24 (1983). The concept of constructive trust is an equitable remedy to prevent unjust enrichment
 25 and enforce restitution. *Haskel Engineering Supply v. Hartford Accident and Indemnity*

1 Company, 78 C.A.3d 371 (1978)

2 Where property is improperly used, the innocent party such as a bankruptcy trustee can
 3 choose either to enforce a lien on the property for the value of the estate's funds or to enforce
 4 a constructive trust on the property. Restatement of Restitution § 210; *Primeau v. Granfield*,
 5 184 F. 480 (S.D.N.Y.) (L. Hand, J.), *rev'd on other grounds*, 193 F. 911 (2d Cir.1911), *cert.*
 6 *denied*, 225 U.S. 708 (1912). The holders of the property have "an equitable duty to convey
 7 it" to the beneficiary, here the trustee. *Provencher v. Berman*, 699 F.2d 568 (1st Cir. 1983)
 8

9 In *Provencher v. Berman*, 699 F.2d 568 (1st Cir. 1983), the court held in that case that
 10 the bankruptcy trustee was entitled to an undivided share of real property "equivalent to the
 11 proportion which his funds bore to the total amount (other than mortgage loans) used by the
 12 [Defendants] to buy the house." In that case, the court awarded the trustee an undivided
 13 interest in the house of 47.9%. *Id.* at 570. The court explained in part as follows:

14 The trustee would be entitled to the entire property only if the [Defendant transferee]
 15 had used solely estate funds (or estate funds plus borrowed funds) to buy the property.
 16 . . . Where, as in this case, the holder used commingled funds to buy the property
 17 subject to a mortgage, according to the authorities we cited, the beneficiary of the
 18 constructive trust (here the trustee in bankruptcy) may take title to a proportionate
 19 share of the entire property, subject to the mortgage. [citations omitted]

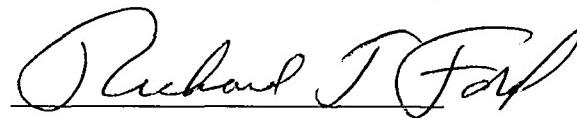
20 Id. at 570-71.

21 In *In re Linsey*, 296 B.R. 582 (Bankr. Mass 2003), the debtor embezzled funds and
 22 purchased two vehicles and used approximately \$25,000 to make improvements to her
 23 house. The court imposed a constructive trust on the two vehicles, but with regard to the
 24 house, the court concluded that since the funds were used to make improvements rather
 25 than to purchase the house, a more appropriate remedy than imposing a constructive trust
 26 over an undivided portion of the house, the court granted the trustee an equitable lien in
 27 the amount of the funds used for the improvements.

1 In this case, it is undisputed that all of the funds used by the Son to purchase the 2nd
2 House came from the sale proceeds of the first House. The Trustee has satisfied all of the
3 elements requisite to the imposition of a constructive trust. Accordingly, the imposition of
4 a constructive trust in favor of the Trustee on the 2nd House is appropriate.
5

6 With respect to the balance of the value of the Transfer not used to purchase the 2nd
7 House (\$41,845 from the January 2004 refinance of the House and \$43,683 in sale
proceeds from January 2005 sale), the Trustee is entitled to a money judgment.
8

9 Dated: 8/13/07



10
11 RICHARD T. FORD
12 UNITED STATES BANKRUPTCY JUDGE
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28